

THIS DISPOSITION IS NOT
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Hearing:
March 27, 1997

NOV. 3, 97
Paper No. 23
PTH

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

American Cyanamid Company
v.
Microsurge, Inc.

Cancellation No. 23,117

Steve J. Baron for American Cyanamid Company.

Michael J. Bevilacqua and Donald R. Steinberg of Hale and
Dorr for Microsurge, Inc.

Before Cissel, Hohein and Hairston, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

American Cyanamid Company has petitioned to cancel a
registration owned by Microsurge, Inc. for the mark
DETACHATIP for "grasper, dissector, scissors for use in
surgery."¹ As grounds for cancellation, petitioner alleges
that for many years prior to respondent's alleged date of
first use, petitioner has been engaged, through its
Davis+Geck division, in the manufacture, sale, and

¹ Registration No. 1,828,839 issued March 29, 1994; alleging a
date of first use of April 1, 1992 and a date of first use in
commerce of July 1, 1993.

advertising of surgical products and instruments; that on or about April 15, 1976 it began using the mark D-TACH on surgical and dental needles; that it is the owner of a registration for said mark and goods²; and that respondent's mark DETACHATIP, when applied to its goods, so resembles petitioner's mark D-TACH as to be likely to cause confusion.

Respondent, in its answer, denied the salient allegations of the petition for cancellation.

Before turning our attention to the facts and merits of this case, we must first consider several evidentiary matters. The first involves petitioner's motion to strike the testimony (and accompanying exhibits) of respondent's witness, John Kilcoyne, concerning respondent's sales brochures and product information sheets. Petitioner maintains that respondent failed to provide this information and the related documents during discovery. Respondent, however, maintains that petitioner did not request such information and documents in its discovery requests. After review of petitioner's discovery requests, we find no interrogatory or production request which covers sales brochures and product information sheets. Moreover, petitioner has pointed to no particular interrogatory or production request which seeks such information or

² Registration No. 1,054,271 issued December 14, 1976; alleging dates of first use of April 15, 1976.

documents. In view thereof, petitioner's motion to strike is denied.

Next, respondent has moved to strike the testimony of petitioner's witness, Alan Lamb, concerning petitioner's level of sales. Respondent contends that petitioner failed to provide this information during discovery. A review of respondent's discovery requests reveals that respondent sought this information by way of its interrogatory no. 4. Petitioner objected to the interrogatory on the ground that the information was irrelevant. It is well settled that sales of a party's goods under its involved mark is proper matter for discovery. Thus, petitioner may not refuse to furnish this information on the ground that it is irrelevant and then introduce testimony with respect thereto at trial. See e.g., *Super Valu Stores, Inc. v. Exxon Corp.*, 11 USPQ2d 1539, 1543 (TTAB 1989) [It would defeat the purpose of the discovery process to allow a party to introduce evidence with respect to matters at trial which it objected to during discovery as confidential]. In view thereof, respondent's motion to strike is granted and petitioner's testimony regarding its sales will be excluded.³

Lastly, during petitioner's rebuttal testimony period, it submitted, under notice of reliance, all of respondent's responses to petitioner's first set of interrogatories,

³ Even if we had considered this testimony, our decision herein would be the same.

first request for admissions, and first request for production of documents. Respondent has moved to strike these materials as improper rebuttal. Petitioner, however, contends that these materials "bear directly on the deposition of respondent's witness, Mr. Kilcoyne." During rebuttal testimony, a petitioner may introduce facts and witnesses appropriate to deny, explain or otherwise discredit the facts or witnesses of respondent. See *Western Leather Goods Company v. Blue Bell, Inc.*, 178 USPQ 382 (TTAB 1973). In its notice of reliance, petitioner failed to specify how any of the responses relied upon deny, explain or otherwise discredit Mr. Kilcoyne's testimony. In view thereof, and because it is not apparent from our review that any of the such responses deny, explain or otherwise discredit Mr. Kilcoyne's testimony, respondent's motion to strike is granted.

The record in this case consists of trial testimony, with exhibits, taken by both parties; a copy of petitioner's pleaded registration introduced during the testimony of its witness, Alan Lamb; and respondent's notice of reliance on certain of petitioner's responses to discovery requests.

Both parties filed briefs on the case and were represented by counsel at the oral hearing held before the Board.

The record shows that since 1976, petitioner, through its Davis+Geck division, has used the mark D-TACH on suturing needles. D-TACH suturing needles are used by surgeons, nurses and other hospital personnel. Petitioner's product manager, Alan Lamb, testified that:

A D-TACH needle is a needle that is removable on command of the operator himself. It eliminates the need for a scrub nurse or an assistant to cut the needle from the suture during the procedure. (Deposition p. 10).

In addition to distributing promotional materials, such as sales brochures and product information sheets, to surgeons and nurses, petitioner advertises in journals directed to these individuals.⁴

Respondent Microsurge, Inc. uses the mark DETACHATIP on scissors, graspers and dissectors used for laparoscopic procedures. Respondent's products are also used by surgeons and nurses. The DETACHATIP products are made up of two parts, a handle and a shaft, which are sold both separately and together. The mark is used on both parts. Each handle sells for approximately \$100 and each shaft sells for approximately \$280-385. According to respondent's witness, Mr. Kilcoyne, the process by which DETACHATIP products are purchased is an involved one. Not only does a representative of respondent meet with the surgeons, nurses

⁴ Although petitioner contends in its brief on the case that D-TACH suturing needles have been widely advertised, petitioner's witness Mr. Lamb offered no advertising figures to support this contention.

and other hospital personnel who will be using the particular product, but the surgeon evaluates the product in an actual procedure. Respondent advertises in journals directed to health care professionals and at trade shows. Mr. Kilcoyne testified that there have been no incidents of actual confusion in the three years since it began use of its mark.

Priority

Petitioner's testimony establishes that it has used its registered mark prior to respondent's date of first use.

Likelihood of Confusion

Petitioner contends that its D-TACH mark is well-known and strong; that a comparison of its mark and respondent's mark DETACHATIP shows a marked similarity in sound; that both parties' goods are marketed to and used by the same class of customers, namely, surgeons, nurses and other hospital personnel; and that where, as here, medical products are involved, it is especially important here to avoid a likelihood of confusion.

Respondent, on the other hand, argues that there are differences in pronunciation of the marks; that while both parties' goods are used during surgery, they are used for very different purposes, i.e., petitioner's goods are suturing products and respondent's products are used to cut/grasp tissue; that respondent's products are purchased

only after a careful selection process; and that there have been no instances of confusion.

After careful consideration of the record and the parties' arguments, we find that the contemporaneous use of the marks D-TACH and DETACHATIP in connection with the respective products is not likely to cause confusion. We reach this conclusion because the parties' marks D-TACH and DETACHATIP differ not only in sound and appearance, but also in meaning, due to their high degree of suggestiveness as applied to the respective goods. Further, petitioner has not shown that the parties' goods are related.

Turning first to the marks, although petitioner has argued that its D-TACH mark is well known and strong, there is insufficient evidence in this record to support this conclusion. As noted previously, not only did petitioner fail to set forth the dollar amount spent advertising and promoting its mark, but in the absence of evidence as to how petitioner's sales stack up against its competitors, or testimony from customers or potential customers for petitioner's products, we have no basis for concluding that petitioner's mark is a particularly strong mark in its field.

Also, contrary to petitioner's argument, the mark D-TACH is highly suggestive of a suturing needle which, as described by its own witness, "is removable on command of

the operator himself." In this regard, we also note the following excerpt from petitioner's product information sheet.

DAVIS+GECK introduces D-TACH Needles—the modern detachable needle with the consistent pull-off strength. A gentle pull on the D-TACH	Needle frees the suture smoothly, easily... every time. New D-TACH Needles are extra-sharp, extra-strong...made of special steel alloys for greater resistance to bending. All receive E-Z Pass processing for smoother	passage through tissue. Speed up procedures with D-TACH Needles, the modern detachable needles.
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Similarly, respondent's DETACHATIP mark is highly suggestive of a surgical grasper, dissector, and scissors with a detachable tip.

Further, there is insufficient evidence in this record from which we may conclude that the parties' goods are closely related. It is not enough that the parties' goods are used by the same people. As respondent points out, the goods are used for very different purposes, and there is nothing in this record to suggest that suturing needles and graspers, dissectors and scissors for use in surgery are the kinds of goods which purchasers would expect to emanate from a single source under the same or similar marks.

As to respondent's remaining argument, while the goods involved herein are medical products, this case is somewhat different from those relied on by petitioner which involved pharmaceutical preparations where confusion could result in severe consequences for the patient.

Decision: The petition to cancel is denied.

Cancellation No. 23,117

R. F. Cissel

G. D. Hohein

P. T. Hairston
Administrative Trademark
Judges, Trademark Trial and
Appeal Board